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No. 87-1137

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JAMES D. KIRK,

Petitioner,

v.

MICHAEL REESE HOSPITAL AND MEDICAL CENTER, IRVING H. TRACER, M.D., HENRY K. FINE, M.D., E.R. SQUIBB AND SONS, INC., and SMITHKLINE CLINICAL LABORATORIES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT, SMITHKLINE CLINICAL LABORATORIES, INC.

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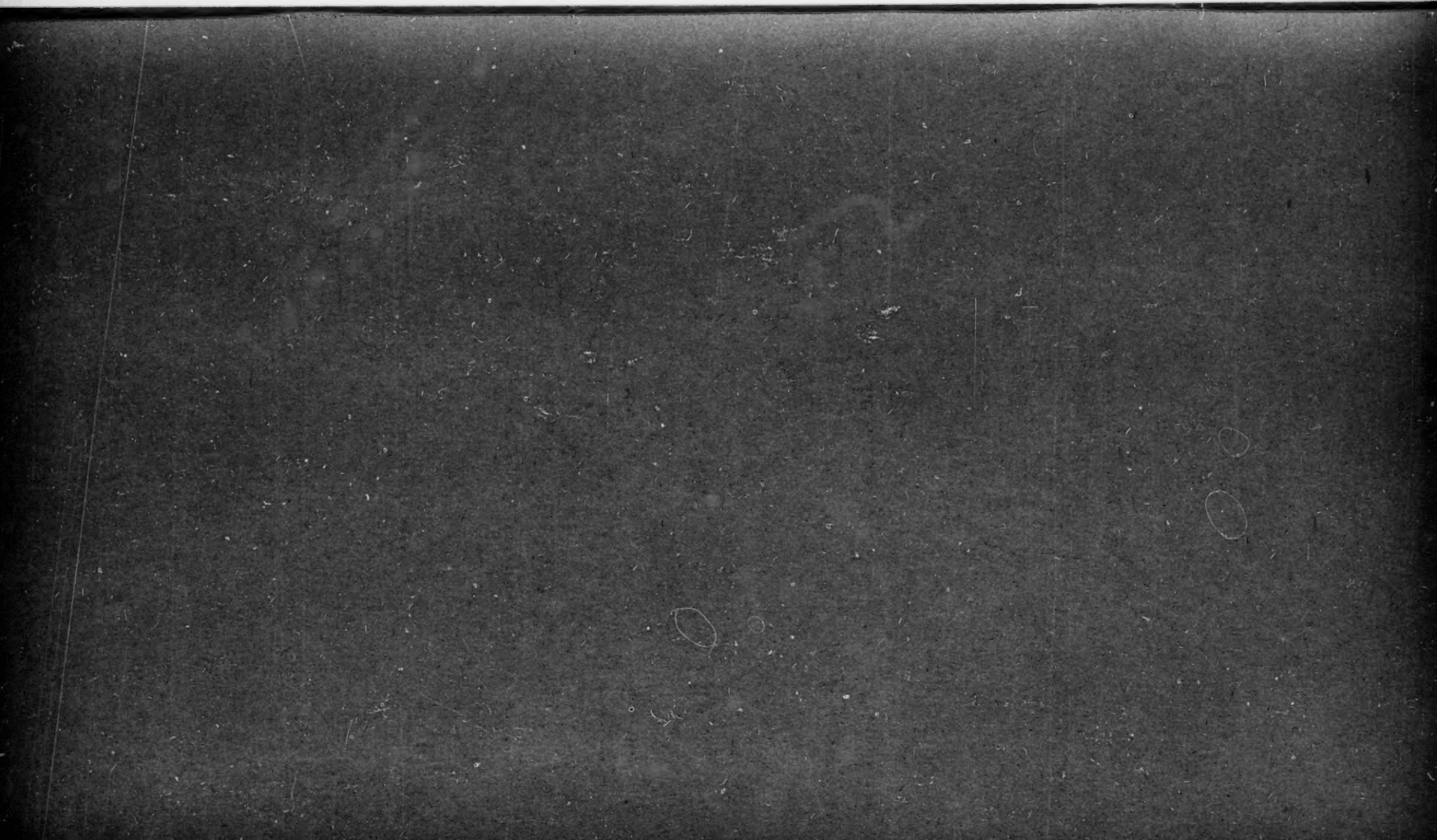

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should exercise *certiorari* jurisdiction when due process and equal protection contentions were never raised in, or decided by, the state courts;

II. Whether due process and equal protection claims made for the first time on a Petition for Rehearing from a state court judgment constitute a viable due process question when the highest state court summarily denied the Petition without any reference to the newly raised due process and equal protection contentions;

III. Whether this Court should exercise *certiorari* jurisdiction to review a state court decision when only state tort law regarding a manufacturer's duty to warn is at issue; and

IV. Whether this Court should exercise *certiorari* jurisdiction when the decision below was based upon adequate and independent state grounds.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties[1] to the proceedings in the court whose judgment is sought to be reviewed.

[1] This Respondent's juridical name and parent is SmithKline Beckman Corporation. All subsidiaries are wholly owned, save SKBL, Inc., which is the only non-wholly owned first tier subsidiary of SmithKline Beckman Corporation.

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On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF IN OPPOSITION OF RESPONDENT, SMITHKLINE CLINICAL LABORATORIES, INC.

SUMMARY OF ARGUMENT

The Court should deny the Petition because Petitioner failed to timely raise any federal question in the state court in order to meet the jurisdictional requirements of the Court. Petitioner raised due process and equal protection arguments only after the Illinois Supreme Court

had rendered its opinion in July of 1987. The Court has consistently refused to exercise its jurisdiction when federal questions are raised for the first time in a Petition for Rehearing and when the state court does not consider or address the federal questions in the order or decision rendered in response to the Petition for Rehearing.

The Petitioner's due process and equal protection claims have no substantive basis, for the Illinois Supreme Court decisions and rules provide that all parties shall have an equal opportunity both to present and to oppose motions in the appellate court and the supreme court of Illinois. Moreover, the Court has recently denied a Petition for Writ of Certiorari on the very issue of the constitutional propriety of the Illinois Supreme Court procedures that Petitioner seeks once again to present to the Court. *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E.2d 685, *cert. denied*, ___ U.S. ___, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986).

The Petitioner erroneously asserts that he was denied a fair trial by the dismissal of his Third Amended Complaint. Petitioner failed to comply with the pleading rules of the State of Illinois, and the Court has consistently declined to exercise its jurisdiction in cases regarding the procedural rules of the States. Moreover, the Court has also consistently declined to exercise its jurisdiction in cases involving the interpretation of state tort law, *e.g.* the duty to warn at issue in the instant case.

Finally, the decisions in the state courts were based upon an adequate and independent state ground. No federal question was ever raised; the state court judgments rest solely on state tort issues. Therefore, the Court should decline to exercise its jurisdiction.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE PETITIONER FAILED TO RAISE ANY DUE PROCESS OR EQUAL PROTECTION CLAIMS IN THE STATE COURT PROCEEDING UNTIL HE FILED A PETITION FOR REHEARING AFTER THE JULY, 1987, ILLINOIS SUPREME COURT OPINION, AND THEREFORE THE CLAIMED CONSTITUTIONAL QUESTIONS HAVE BEEN WAIVED AND SHOULD NOT BE REVIEWED BY THIS COURT UNDER ITS CERTIORARI JURISDICTION.

Petitioner has no just basis for asking this Court to exercise *certiorari* jurisdiction. Petitioner's due process and equal protection contentions were raised for the first time in a Petition for Rehearing filed in the Illinois Supreme Court. Petitioner did not raise them in the trial court. He did not raise them in the Illinois Appellate Court. Nor were they briefed or argued by Petitioner in the Illinois Supreme Court; only in his Petition for Rehearing from the adverse final judgment of that court did Petitioner first raise due process and equal protection arguments. Since Petitioner had ample prior opportunity to obtain a ruling on his alleged due process and equal protection questions but failed to raise them before the decision of the Illinois Supreme Court, Petitioner has waived his due process and equal protection challenge under Illinois law. *Clore v. Fredman*, 59 Ill. 2d 20, 319 N.E.2d 18 (1974); *Flynn v. Vancil*, 41 Ill. 2d 236, 242 N.E.2d 237 (1968); *Hillblom v. Ivancsits*, 76 Ill. App. 3d 306, 395 N.E.2d 119 (1979).

The long established rule is that this Court has no jurisdiction to review a federal question unless it was both raised and decided in the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Crowell v. Randall*, 35 U.S. (10 Pet.) 368, 391 (1836). In the instant case, the Petitioner did not timely raise his due process and equal protection arguments in the state courts, and, as the opinions of those courts demonstrate, the state courts did not decide or address those constitutional issues. Petitioner, therefore, is barred from raising these claims in this Court. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928).

Moreover, raising a federal question for the first time in a Petition for Rehearing, as Petitioner has attempted to do in the instant case, is insufficient for federal jurisdictional purposes. This Court has exercised its jurisdiction only when the highest state court has actually entertained a Petition for Rehearing and has expressly rejected the federal question issues. *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). This possible exception is not satisfied, however, by the state court's modifying its opinion without considering the federal questions—as is the situation in the instant case. Petitioner must demonstrate that the state court considered the federal question, and denied a rehearing, notwithstanding. *Forbes v. State Council of Virginia*, 216 U.S. 396, 399 (1910); *McCorquodale v. Texas*, 211 U.S. 432, 436-37 (1908).

Furthermore, this is not a case where Petitioner can claim "surprise." The due process issue that Petitioner is now claiming did not originate in the Illinois Supreme Court's decision. The complaint was dismissed in the trial court, but the due process argument was not presented until

years later at the time the Petition for Rehearing was filed in the Illinois Supreme Court. Moreover, Petitioner could have presented the same arguments during the nearly two years throughout which this matter was pending in the Illinois Supreme Court. At no stage in the proceedings did he do so. For these reasons, the Petition for Writ of Certiorari should be denied.

II.

PETITIONER'S DUE PROCESS AND EQUAL PROTECTION CLAIMS ARE TOTALLY DEVOID ON THE MERITS.

Not only are Petitioner's due process and equal protection claims not properly presented to this Court for the exercise of its *certiorari* jurisdiction but also they are utterly devoid on the merits. The 1970 Constitution of the State of Illinois, Article VI, Section 16, provides as follows:

> General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules.

Petitioner erroneously argues that the Illinois Supreme Court has failed to comply with its rules and therefore has violated Petitioner's constitutional rights. In *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E. 2d 685, *cert. denied*, ____ U.S. ____, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), the Illinois Supreme Court specifically addressed the issue of adherence to its rules. Therein, the court took note of its 1979 order providing that Motions for Reconsideration of denials of Petitions for Leave to Appeal are not to be accepted by the Clerk of the Court. In *Johnson*, the Illinois Supreme Court also stated that even if "permitting the filing of a motion for reconsideration [arguably] consti-

tuted a violation of [the 1979] order and of due process," the court had protected the due process rights of the litigants by permitting a Motion for Leave to File a Motion for Reconsideration to be filed under its Rule 361. *Id.* at 472-73, 490 N.E.2d at 686-87. So long as the court does not deprive litigants of their general access to the court through the motion process, it does not deprive litigants of constitutional due process. So long as the Illinois Supreme Court abides by its Rule 361, it does not deprive litigants of due process because of the authority vested in the Illinois Supreme Court by the 1970 Constitution of the State of Illinois.

In the instant case, the Record demonstrates that the Petitioner cannot legitimately complain that, as applied to him, the Illinois Supreme Court violated any constitutionally-protected rights. The Motion for Leave to File the Motion for Reconsideration was filed jointly by the Respondents with the Clerk of the Illinois Supreme Court pursuant to Rule 361 on February 25, 1986. The Notice of Motion, the Motion for Leave to File the Motion for Reconsideration, the Motion for Reconsideration, and the Mailing Affidavit were sent by Respondents to the Petitioner on February 24, 1986.

On February 28, 1986, the Illinois Association of Defense Trial Counsel, by its attorneys, mailed to the Clerk of the Illinois Supreme Court and to the attorneys of record herein, including Petitioner's counsel, both its Petition for Leave to Intervene as Amicus Curiae and its Motion in Support of the Motion for Reconsideration. This Respondent respectfully submits that on the first page of the Illinois Defense Trial Counsel's Motion in Support of Reconsideration, the movant set forth the holding in the Illinois Supreme Court's decision in *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E. 2d 685, *cert. denied*, ___ U.S. ___, 107

S. Ct. 113, 93 L. Ed. 2d 60 (1986), which as aforementioned, affirmed the Illinois Supreme Court's jurisdiction to reconsider the denial of Petitions for Leave to Appeal in appropriate instances. Petitioner, therefore, was expressly advised of the Illinois Supreme Court's opinion governing Motions for Reconsideration.

Review of the *Johnson* decision and of Rule 361 reveals that Petitioner's proper procedure upon receipt of the Motion for Leave to File the Motion for Reconsideration was either to file a written objection with the Clerk of the Supreme Court within five days after Respondents mailed their joint motion or to seek, either from the court or one of the judges, further time in which to file his objections. Rule 361 provides as follows in pertinent part:

> 361. Motions in Reviewing Court
>
> (b) (2) *Objections to a motion shall be in writing and be filed, with proof of service, within three days after personal service of the motion, or five days after mailing of the motion if service is by mail, or within such further time as the court or a judge thereof may allow.* Except by order of court, replies to objections will not be allowed and oral arguments on motions will not be heard.

Ill. Rev. Stat. ch. 110(A), para. 361 (1985) (emphasis added).

Petitioner, however, did not file an objection within five days after the Motion for Leave to File the Motion for Reconsideration was mailed. Indeed, Petitioner totally ignored the rule and failed to seek any further time from the court or a judge thereof in which to file his objections to Respondents' motion. The Illinois Supreme Court Docketing Sheet shows no request whatsoever by Petitioner for an extension of time to file objections to Respondents' motion. The Illinois Supreme Court did not

rule on Respondents' motion until March 18, 1986; yet Petitioner had taken no action in his own behalf as provided both by Illinois case law in *Johnson v. Colley*, 111 Ill. 2d 468, 490 N.E.2d 685, *cert. denied*, ____ U.S. ____, 107 S. Ct. 113, 93 L. Ed. 2d 60 (1986), and by Illinois Supreme Court Rule 361, which Rule was promulgated under the 1970 Constitution of the State of Illinois.

Indeed, the only action taken by the Petitioner vis-a-vis the Respondents in the Illinois Supreme Court was the filing of an Appearance. The Appearance that Petitioner filed on March 3, 1986, in the Illinois Supreme Court, which was the only pleading filed by the Petitioner before the court ruled on Respondents' motions, can be construed only as acknowledgment of the Illinois Supreme Court's jurisdiction over the appeal.

After the Illinois Supreme Court granted Respondents' Motion for Reconsideration on March 3, 1986, the instant case remained pending in that court until the decision in July of 1987. At no time while the case was pending in the Illinois Supreme Court did the Petitioner assert that his due process or equal protection rights had been violated. Indeed, Petitioner could not validly assert any violation of his due process and equal protection rights, because no violation of his constitutional rights existed. The procedures of the Illinois Supreme Court as applied to Petitioner were in full accord with the concepts of procedural due process and equal protection. This Court should not now permit Petitioner to seek further relief on the grounds that the Illinois Supreme Court had no jurisdiction over the appeal when Petitioner failed to protect his rights by objecting to the procedures set forth by the Illinois Supreme Court, which procedures were specifically established to protect the rights of litigants in that court under the statutes and the Constitution of the State of Illinois.

III.

THE ILLINOIS SUPREME COURT PROPERLY UPHELD THE TRIAL COURT'S DISMISSAL OF PETITIONER'S THIRD AMENDED COMPLAINT, SPECIFICALLY FINDING THAT THIS RESPONDENT DRUG MANUFACTURER HAD NO DUTY TO WARN THE GENERAL PUBLIC.

In the Petitioner's Third Amended Complaint, which Respondent's motions to dismiss attacked, Petitioner failed to allege that the warning to the treating and prescribing physicians was inadequate. Nor did the Petitioner allege any facts to justify a legal conclusion that the warnings to the prescribing and treating physicians were inadequate. Rather, the Petitioner merely alleged that the warning to the patient and general public was inadequate. Both in the Third Amended Complaint and throughout the state court proceedings, the Petitioner argued that adequate warning of the dangerous propensities of the ethical drugs involved was not provided to the patient and to the general public.

The Respondents properly sought dismissal of Petitioner's Third Amended Complaint. Respondents contended that the Third Amended Complaint failed to allege a recognized duty owed by an ethical drug manufacturer. Petitioner stood on the facially deficient pleading, again waiving any right to amend his Complaint, and the trial court granted the Motion to Dismiss with prejudice. The Illinois Supreme Court upheld the trial court's dismissal finding "no duty on the part of manufacturers of prescription drugs to directly warn patients" and "no duty to warn a nonuser as Kirk" (Petition Appendix 7a).

Petitioner now claims that he was deprived of his due process right to a fair trial because his Third Amended Complaint was dismissed without allowing Petitioner an opportunity to present evidence to a trier of fact in sup-

port of his allegations. Yet, even were all of Petitioner's well-pleaded allegations deemed true, as the Illinois Supreme Court considered them when reviewing the lower court decisions, the Third Amended Complaint was deficient, for it failed to allege a duty owed by the Respondents. Therefore, the state courts were not required to address the issue of whether the Respondents had breached a duty to warn because Petitioner had never alleged said duty in his four attempts to state a cause of action against the Respondent.

Moreover, even had the Illinois Supreme Court found that the Petitioner sufficiently alleged a breach of a viable duty owed by ethical drug manufacturers, the court properly concluded that a decision on the adequacy of the warnings given by the manufacturers to the prescribing and treating physicians was "premature and puts the cart before the horse" (Petition Appendix at 7a). Contrary to Petitioner's arguments, the court was not required to consider whether the warnings given to the physicians were adequate (Petition at 13-14). Rather, the court held that before considering the adequacy of the warnings, the facts alleged by the Petitioner "demonstrate *on their face* that plaintiff would never be entitled to recover" (Petition Appendix at 9a). The court upheld the lower court's dismissal because the alleged facts demonstrate that the Respondent should not have foreseen that the drugs "would be dispensed without warnings by the physicians, that the patient would be discharged from the hospital, drink alcohol, drive a car, lose control of his car, hit a tree and injure the passenger, Kirk, on the same day" (Petition Appendix at 9a).

The Petitioner was not deprived of any due process right to a fair trial or fair access to the courts. The disputed factual issue, which Petitioner argues was improperly de-

cided by the state court, was not at issue in the court's review of the dismissal of Petitioner's Third Amended Complaint. Before any court could address the adequacy of the warning, Petitioner was required to sufficiently plead a foreseeable duty owed to Petitioner by the Respondent ethical drug manufacturers. The Illinois Supreme Court properly held that Petitioner had not pleaded such a duty under Illinois law. Therefore, this Court should not consent to consider Petitioner's argument regarding this narrow issue of state tort law.

IV.

THIS COURT SHOULD DENY THE PETITION BECAUSE THE DECISION BELOW RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should not exercise jurisdiction to decide the instant case because the decision of the Illinois Supreme Court rested solely on an adequate and independent state ground. No federal question was ever involved in the proceeding below. The judgment rests squarely and only on state tort law. State court judgments that are based solely on state law should not be reviewed by this Court. *Herb v. Pitcairn*, 324 U.S. 117 (1945). The only power that this Court possesses to consider and correct state judgments is to the extent that these judgments incorrectly decide federal rights. *Id.* at 126.

This Court has previously indicated that respect for the independence of state courts, as well as the policy of not rendering advisory opinions, is the foundation for this Court's refusal to decide cases in which an adequate and independent state ground exists. This Court has emphasized that because of its respect for state courts, it will not decide issues of state law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Any decision by this Court in the in-

stant case, which case rests solely on the tort law of the State of Illinois, would necessarily impinge upon state law. It is imperative that this Court deny the Petition herein because the Illinois Supreme Court decision is based upon an adequate and independent state ground; therefore, this Court should not exercise its jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent SmithKline Clinical Laboratories, Inc. respectfully submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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February 4, 1988